

**APPEAL No. 03-2343**

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC.,  
AND REVEREND KEVIN BROWN,  
*Plaintiffs/Appellants*

v.

THE CITY OF LONG BRANCH,  
*Defendant/Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY, CIVIL ACTION No. 00-03366  
(HONORABLE WILLIAM H. WALLS, U.S.D.J)

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**BRIEF OF PLAINTIFFS-APPELLANTS  
THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC.,  
AND REVEREND KEVIN BROWN AND APPENDIX I**

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**STATEMENTS OF SUBJECT MATTER**  
**AND APPELLATE JURISDICTION**

This action was brought in the District Court pursuant to 42 U.S.C. §§ 1983, 3601, and 2000cc *et seq.* Jurisdiction was founded upon 28 U.S.C. §§ 1331 (federal question), 1343(a) (civil rights), and 1367 (supplemental jurisdiction). For purposes of this appeal, Plaintiffs-Appellants challenge the facial legality of Long Branch's Zoning Ordinance under the First Amendment, Fourteenth Amendment, and RLUIPA.

Jurisdiction in this Court is founded upon 28 U.S.C. § 1292(a)(1), as this appeal results from an interlocutory decision of the District Court denying Plaintiffs-Appellants' motion for preliminary injunction.

## **STATEMENT OF ISSUES**

1. Did the District Court err in holding that an Ordinance, which on its face permits various public assembly land uses such as “assembly halls,” “colleges,” “theaters,” “municipal buildings,” “restaurants” as of right in its Central Commercial District--but forbids churches--does not violate either the “Equal Terms” provision of the Religious Land Use and Institutionalized Persons Act, the Free Exercise Clause, the Free Speech Clause, or the Equal Protection Clause?

5. Did the District Court err in denying Appellant a preliminary injunction?

## STATEMENT OF THE CASE

Plaintiffs-Appellants The Lighthouse Mission (the “Mission”) and Reverend Kevin Brown filed suit against the City of Long Branch in the Monmouth County Law Division, Docket No. MON-L-2729-00 on June 8, 2000, challenging Long Branch’s zoning ordinance. *See* Opinion Granting Summary Judgment in Part, and Denying Summary Judgment in Part, to City Of Long Branch (April 7, 2003) at 3 (the “Def. SJM Op.”); Apx. 42. On July 12, 2000, Long Branch filed a Notice of Removal pursuant to 28 U.S.C. § 1441. *Id.* at 4; Apx. 43.<sup>1</sup> On October 23, 2000, Plaintiffs filed an Amended Complaint, adding claims under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc *et seq.* *Id.*

Discovery was stayed pursuant to a January 29, 2001 order by Magistrate Judge Wigenton pending the outcome of anticipated motions and cross-motions for summary judgment and preliminary injunction, which were filed on March 8, 2001 (by Defendants Long Branch, AG&F and Falvo), March 13, 2001 (by Plaintiffs), and March 21, 2001 (by Defendants BCIC and Breen). *Id.* at 4-5; Apx. 43-44.

On April 7, 2003, the District Court ruled on these motions. *See* Order Denying, *inter alia*, Preliminary Injunction (April 7, 2003) (the “Order”); Apx. 3.

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<sup>1</sup> Not relevant for purposes of this Appeal, Defendant BCIC below instituted a Complaint in Personam Tax Foreclosure in the Monmouth County Chancery Division against Plaintiffs’ property on May 11, 2000. Def. SJM Op. at 4; Apx. 43.

The lower court denied Plaintiffs’ Motion for Summary Judgment as to Count III of the Amended Complaint (facial Free Exercise violation); and its Motion for Preliminary Injunction against Long Branch and BCIC in its entirety. *Id.* at 1-2; Apx. 3-4. It dismissed Counts II-IX and XIII of the Amended Complaint (federal constitutional and statutory challenge to Defendants’ zoning laws) and in so far as Long Branch’s zoning laws were illegally applied to Plaintiffs without prejudice, holding that “the application of the Ordinance to their property is not ripe for review . . . .”<sup>2</sup> *Id.* at 2; Apx. 4; Def. SJM Op. at 28, 29, 31, 32; Apx. 67, 68, 70, 71. Finally it denied Long Branch’s Motion for Summary Judgment as to Plaintiffs’ facial challenge to Long Branch’s zoning ordinances, Order at 1-2; Apx. 3-4, holding *inter alia*, that there are genuine issues of material fact as to whether the Ordinance substantially burdened the plaintiff’s exercise of religion. Opinion Denying Plaintiffs’ Motions For Preliminary Injunction and Summary Judgment (April 7, 2003) at 26-28 (the “Pl. SJM Op.”); Apx. 30-32. However, it “observed” that “Plaintiffs will not likely be able to prove, even after further factual development, that the Ordinance inherently violates their rights under the

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<sup>2</sup> Not relevant for purposes of this Appeal, the District Court also granted Long Branch’s Motion for Summary Judgment on Count I of the Amended Complaint (Writ of Mandamus under N.J. state law); granted Long Branch’s Motion for Summary Judgment on the punitive damages claims in Counts II-IX and XIII (federal constitutional and statutory violations); denied as moot Long Branch’s Motion for Summary Judgment on the compensatory damages claim in Count I (Mandamus); granted BCIC’s Motion for Summary Judgment; and denied Defendants AG&F & Falvo’s Motion for Summary Judgment. Order at 2; Apx. 4.

RLUIPA, First Amendment rights, or Fourteenth Amendment equal protection rights,” Pl. SJM Op. at 32; Apx. 36, and therefore denied the Mission’s Motion for Preliminary Injunction.

The Plaintiffs filed the Notice of Appeal on May 5, 2003. Notice of Appeal; Apx. 1-2. This Appeal is limited solely to the question of whether Long Branch’s Zoning Ordinance, on its face, violates the First and Fourteenth Amendments of the United States Constitution and RLUIPA’s “Equal Terms” provision and therefore the Mission is entitled to a Preliminary Injunction.

### **STATEMENT OF FACTS**

The Lighthouse Mission (the “Mission”) is a Christian church that seeks to serve the poor and disadvantaged in downtown Long Branch, New Jersey. Amend. Cmplt. ¶ 10; Apx. 146. Nearly one-quarter of the households in Long Branch earn under \$15,000 per year, and the City has been described as “struggling with high rates of unemployment and depressed neighborhoods.” *Id.*; MaryAnn Spoto, *Long Branch, Out of the Ashes*, NEWARK STAR LEDGER, June 26, 2003 at 19. Since 1991, the Mission has strived to “(a) administer its congregation while living, practicing, and proclaiming the teachings of the New Testament and the gospel of Jesus Christ; (b) operate a minister school for purposes of credentialing, licensing, and ordaining qualified individuals who seek formal ministry; and (c) operate

benevolent services and agencies to the community through outreach of membership.” Def. SJM Op. at 2; Apx. 41; Amend. Cmplt. ¶ 1; Apx. 144.

Among the Mission’s religiously motivated charitable activities designed to fulfill its goal of ministering to the poor, it provides job placement and substance abuse counseling, Amend. Cmplt. ¶ 11; Apx. 146, and assists “street people who would probably be turned away anywhere else.” Amend. Cmplt. ¶ 11; Apx. 146; Brown Cert. Ex. “F”; Apx. 147 (“Lighthouse Mission brightens city’s ‘mean streets,’” Atlanticville, May 13, 1993). From 1992 to 1994, Long Branch permitted the Mission to carry out its religious activities at a rented location at 159 Broadway, Long Branch, New Jersey. Def. SJM Op. at 5-6; Apx. 44-45; Amend. Cmplt ¶ 10, 23; Apx. 146, 149.

In 1993, the Mission sought to expand these religious activities, but was unable to do so because it did not own the premises at 159 Broadway. Amend. Cmplt. ¶ 12; Apx. 147. Accordingly, the Mission sought to acquire property in the same area in which it was carrying out its ministries. On November 8, 1994, the Mission purchased the property known as 162 Broadway, Long Branch (the “Property”), which at the time was an abandoned building across the street from its previous location. Def. SJM Op. at 5; Apx. 44; Amend Cmplt ¶¶ 13, 19; Apx. 147, 148. The Mission wishes to “use the building at 162 Broadway for (a) a soup kitchen; (b) a mission; (c) job skills training programs; (d) a counseling center; (e)

Bible classes; and (f) life skills classes.” Def. SJM Op. at 6; Apx. 45; *id.* at 9; Apx. 48 (noting that City forbade Mission from “church services/soup kitchens/classes”).

The Property is located in the City’s C-1 Commercial District. Def. SJM Op. at 5; Apx. 44; Amend. Cmplt. ¶ 23; Apx. 149; Brown I Decl. ¶ 44.; Apx. 348; Long Branch Zone Map (rev. Dec. 9, 2002); Apx. 475.<sup>3</sup> Although a number of assembly uses are permitted in the C-1 District, churches are not permitted either by right or by Conditional Use Permit in this district. Def. SJM Op. at 5; Apx. 44; Long Branch Ordinance No. 20-6.13(a); Apx. 215.

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<sup>3</sup> Although not relevant for purposes of this Appeal—because this Appeal is not challenging the District Court’s decision on Plaintiffs’ “as-applied” challenges—the Mission has engaged in several efforts to secure permission from Long Branch to use the Property. Initially, it sought to file an Application for Development for use as a soup kitchen, a mission, job skills training programs, counseling, Bible classes, and life skills classes. Def. SJM Op. at 6; Apx. 98. This application was initially deemed incomplete by Long Branch, *id.*, and subsequently abandoned after hearing “public and private pronouncements of Mr. Barry Stein, Long Branch’s Director of Community Development, who proclaimed that Long Branch ‘was never going to allow the Mission to use 162 Broadway.’” Amend. Cmplt. ¶ 27; Apx. 150. On March 26, 1997, the Mission applied for a zoning permit to use the Property, which was granted by Long Branch (for use as the Mission’s offices) with the condition that “no church services/soup kitchens/classes/residential uses [would]be allowed with this permit.” *Id.* at 8-9; Apx. 101. Reverend Brown submitted a request to use the second floor of the Property as a pastoral residence, but was denied by the City in 1999. *Id.* at 10; Apx. 151. The Mission submitted a request on April 26, 2000 to use its Property as a church. *Id.* at 11; Apx 152. Because a church is not a permitted use in the C-1 District, the Zoning Officer denied the application on April 27, 2000. *Id.*

In particular, Long Branch permits the following public assembly land uses as of right in the C-1 District:

- “Assembly hall, bowling alley and motion-picture theater”;
- “Health spa/gym”;
- “Educational services and colleges”;
- “Municipal buildings, parks and playgrounds”;
- “Restaurants and eating and drinking places.”

*Id.*; Pl. SJM Op. at 4-5; Apx. 8-9. Long Branch also included “Professional office/services” as a permitted use in the C-1 District in 1996. *See* Long Branch Ordinance Nos. 6-96, 20-96 (1996).

Some of the specific assembly uses Long Branch has permitted in the C-1 District pursuant to its ordinance include the Portuguese Club, “a four story commercial building which is exclusively used as a fraternal organization for the Portuguese community to conduct assemblies and catered events,” the Spanish Fraternity of Monmouth County, “which holds dances and sells alcohol beverages at 149 Broadway,” the Brookdale Community College Learning Center; the Seashore Day Camp’s gym/auditorium; and the Monmouth Medical Center Free Clinic on lower Broadway. Declaration of Kevin Brown ¶ 50 (Mar. 8 2001) (“Brown I Decl.”)<sup>4</sup>; Apx. 350; *see also* Defendants’ Post-Hearing Submission to Judge Walls (May 23, 2001); Apx. 543-560 (describing permit for Seashore Day

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<sup>4</sup> The March 8, 2001 Declaration of Rev. Kevin Brown is mistakenly dated March 8, 2000. It was filed with the District Court on March 14, 2001. *See* Docket Report at 7; Apx. 89.

Camp); Apx. 568 (listing “Long Branch Portuguese Club” at 191 Broadway as a “tax exempt property”). Across the street from the Property at 179 Broadway is the New Jersey Repertory Company Theater. Brown I Decl. ¶ 49; Apx. 350; Defendants’ Post-Hearing Submission to Judge Walls; Apx. 568 (listing “N J Repertory” at 179 Broadway as a “tax exempt property”). Other public assembly uses also exist in the C-1 district. Brown I Decl. ¶¶ 49-52; Apx. 350-53. Additionally, the City, in a discretionary fashion, continues to permit certain churches to exist in the C-1 zone. Brown I Declaration ¶ 48; Apx. 349; Plaintiffs’ Post-Hearing Submission to Judge Walls (May 15, 2001); Apx. 477-480 & Exhs.<sup>5</sup>

Since the filing of the Amended Complaint and the subsequent Motions for Preliminary Injunction and Summary Judgment, the City has enacted a “Long Branch Broadway Redevelopment Plan” (“LBBRP”), which additionally places the Mission’s Property in the “Regional Entertainment Commercial land use area.” *See* Ordinance No. 47-02; Apx. 433; Long Branch Broadway Redevelopment Plan;

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<sup>5</sup> These include the First Reformed Church and St. James Episcopal Church. The lower court was informed about these uses. *See* Plaintiffs’ Post-Hearing Submission to Judge Walls (May 15, 2001); Apx. 477-480 & Exhs. These facts were not denied by the City. *See* Defendants’ Post-Hearing Submission to Judge Walls (May 23, 2001); Apx. 485-489. In fact, the City listed two additional churches in the C-1 district: The Missionary Pentecostal Church of God and the Long Branch Church of God. *Id.*; Apx. 486. While two of these churches are pre-existing nonconforming uses—that nonetheless negate any claims of “compelling” interest Long Branch may assert in banning churches on Broadway—the City admitted that two others had more recently received permits to locate in the district. *Id.*

Apx. 434; Long Branch Redevelopment Plan, Design Guidelines Handbook, Broadway; Apx. 444, 449 (“Broadway Handbook”); *see also* Ordinance 47-02; Apx. 433 (“Uses in the redevelopment area shall be limited to those permitted in the Redevelopment Plan.”). Although not in force at the time of the filing of the Amended Complaint and Motions for summary judgment and preliminary injunction, Appellant requests that this Court take judicial notice of the Long Branch Broadway Redevelopment Plan, enacted on October 22, 2002. LBBRP at 1; Apx. 436; Broadway Handbook at 1; Apx. 444. It is a Long Branch Ordinance, has the force of law with respect to the Property, and is certainly relevant to the Mission’s Motion and prospective use of its Property. Ordinance No. 47-02; Apx. 433. The Generalized Land Use “goals” of the LBBRP are to create a “viable commercial downtown – consisting of a wide range of complementary retail and business and *civic* uses – that serve the immediate community . . . .” Broadway Handbook at 5; Apx. 449 (emphasis added). However, perhaps tellingly, the LBBRP nowhere mentions churches or accommodating residents’ need for religious services in its “Specific Redevelopment Objectives.” LBBRP at 2-3; Apx. 437-438. Permitted uses in the Regional Entertainment Commercial land use area include a number of public assembly uses:

- Performance Art Venues;
- Dinner Theatre and Cabaret;
- Small dance clubs;
- Cyber cafes;

- Rehearsal rooms;
- Theater workshops;
- Fashion Design School;
- Art Studios.

Broadway Handbook at 6; Apx. 450. None of the other downtown commercial districts in the LBBRP permit churches, although all include other public assembly uses, including:

- Community Hall and Exhibition Hall, Public Library (Civic Commercial land use area);
- Community Clubs and Centers; Funeral Homes; Community Colleges (Downtown Commercial);
- Auction House (Regional Commercial);
- Public Recreational (Civic Recreational).

*Id.* at 6-8; Apx. 450-452. Even after the LBBRP, churches remain excluded from the uses permitted under any circumstances in the C-1 district.

### **STATEMENT OF RELATED CASES**

Defendant BCIC has instituted a Complaint in Personam Tax Foreclosure in the Monmouth County Chancery Division against Plaintiffs' Property. *BCIC Funding Corp. v. Lighthouse Mission, Inc. et. al.*, Docket No. F-8075-00. BCIC obtained a default in the foreclosure action that was vacated via consent order on February 15, 2001. Settlement is likely with respect to that case.

## STATEMENT OF THE STANDARD OF REVIEW

The standard of review of the lower court's decision "to deny a preliminary injunction . . . [is] for abuse of discretion." *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 156 (3d Cir. 2002). However, "any determination that is a prerequisite to the issuance of an injunction . . . is reviewed according to the standard applicable to that particular determination." *Id.* (internal citations and quotations omitted). Accordingly, this Court must "exercise plenary review over the District Court's conclusions of law and its application of the law to the facts." *Id.* (internal citations and quotations omitted).

Although an appellate court will generally "not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error," the clear error standard does not apply to cases, like this one, that involve First Amendment claims. *Id.* (internal citations and quotations omitted). Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," the Court has "a constitutional duty to conduct an independent examination of the record as a whole, and . . . cannot defer to the District Court's factual findings unless they concern witnesses' credibility." *Id.* 156-57. Thus, the Court must "examine independently the facts in the record and "draw [its] own inferences from them." *Id.* (internal citations and quotations omitted).

## SUMMARY OF ARGUMENT

On its face, Long Branch’s zoning ordinance treats churches worse than a host of secular assembly land uses (including “assembly halls”) in the Central Commercial district. The lower court’s analysis of the Mission’s statutory and constitutional claims was fatally flawed from the start because it failed to consider, contrary to the binding authority of the Supreme Court and this Court, whether churches were treated worse than secular assembly uses in the particular zone at issue, where the Mission sought to locate. *See infra*, § I(A). Having failed to properly examine how Long Branch’s Ordinance treated churches in the relevant zone, the lower court erred in failing to hold that the Ordinance discriminatorily favors nonreligious public assembly land uses over religious public assembly land uses. *See infra*, § I(A).

This disparate treatment of churches is unlawful under both Section 2(b)(1) of RLUIPA and the constitutional provisions that the Act codifies. In particular, RLUIPA’s “Equal Terms” provision prohibits governments from treating religious assemblies on “less than equal terms” than nonreligious assemblies. *See infra*, § I(C)(1). The Free Exercise Clause prohibits governments from favoring conduct undertaken with secular motivations over conduct undertaken with religious motivations. *See infra*, § I(C)(2). The Free Speech Clause prohibits governments from restricting expressive activity because of the religious content of that

expression. *See infra*, § I(3). Finally, the Equal Protection Clause forbids the government from treating similarly situated land uses unequally. *See infra*, § I(C)(4).

Since the Mission is likely to succeed on its claims under RLUIPA and the Constitution, the lower court's sole justification for denying a preliminary injunction—likelihood of success on the merits, Pl. SJM Op. at 2; Apx. 4—does not exist, and this Court should order that an injunction issue.

## ARGUMENT

### I. **THE DISTRICT COURT ERRED IN HOLDING THAT LONG BRANCH'S ZONING ORDINANCE, ON ITS FACE, DOES NOT VIOLATE RLUIPA AND THE UNITED STATES CONSTITUTION.**

#### A. The Lower Court Committed Reversible Error By Failing to Compare How the City's Zoning Ordinance Treats Churches Compared to Secular Public Assemblies in the Central Commercial District Where the Mission's Property Is Located.

As a preliminary matter, the lower court faltered at the outset of its analysis by ignoring controlling Supreme Court and Third Circuit precedent. Instead of comparing the City's treatment of churches with its treatment of secular public assembly uses in the pertinent District zone where the Mission's Property is located, the lower court opined that the "zoning scheme must be viewed as a whole" and examined how churches were treated in districts where the church has neither a property interest nor a desire to locate. *See* Pl. SJM Op. at 29; Apx. 33.

This “separate but equal” mode of analysis is in direct contradiction to the Third Circuit’s rule in church-zoning cases:

[T]he first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is similarly situated to other uses that are either permitted as of right, or by special permit, in a certain zone.

*Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 137 (3d Cir. 2002) (emphasis added).

This rule follows not only the Supreme Court’s holdings in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (examining solely the permitted uses in Cleburne’s R-3 zone), and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (1981) (holding that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”), but also that of other federal courts. *See, e.g., Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8<sup>th</sup> Cir. 1991) (examining solely uses in C-3 zone); *Christ Universal Mission Church v. City of Chicago*, Civ. No. 01-1429, 2002 U.S. Dist. LEXIS 22917 at \*23 (N.D. Ill. Sept. 13, 2002) (“[T]he City cites no authority for its position that the entire zoning scheme must be examined to determine the constitutionality of its exclusion of churches in the M zone. In fact, the Court specifically notes that *City of Cleburne* and each of the other church zoning cases cited above applied a “zone” approach . . .”).

The argument fails not only legally, but factually as well. The Mission seeks to help the poor and the disadvantaged, precisely the type of people it will find in the C-1 district. It is no constitutional answer to tell the Mission, as the lower court did, that it can (and must) locate in some other suburban neighborhood away from the community it seeks to serve. *See* Pl. SJM Op. at 30; Apx. 34 (“[C]hurches and other religious assemblies are permitted uses in other areas of Long Branch and [] Plaintiffs could establish their church and mission in those areas”). This is the equivalent of telling Mother Theresa’s order to abandon their ministry in Calcutta’s poorest regions and take up residence in the Taj Mahal. This argument must be rejected outright.

B. The City’s Zoning Ordinance Discriminatorily Favors Nonreligious Public Assembly Land Uses Over Religious Public Assembly Land Uses.

A straightforward examination of the terms of the City’s Ordinance governing permitted uses in the C-1 District reveals that churches (like the Mission) are treated worse than a wide variety of equivalent secular assembly uses. These other public assembly uses are permitted even though a number of them find equivalent—but prohibited—counterparts in the Mission’s planned uses.<sup>6</sup> Among

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<sup>6</sup> As the court below noted, the Mission wishes to “use the building at 162 Broadway for (a) a soup kitchen; (b) a mission; (c) job skills training programs; (d) a counseling center; (e) Bible classes; and (f) life skills classes.” Def. SJM Op. at

the most obvious examples of preferentially treated secular assembly uses are the following.

Assembly Halls: Perhaps most obviously, assembly halls, but not churches, are permitted in the C-1 District. Ordinance No. 20-6.13(a)(3), Apx. 80.

According to the American Planning Association, an “assembly hall” is:

A building or portion of a building in which facilities are provided for civic, educational, political, *religious* or social purposes. . . .

A meeting place at which the public or membership groups are assembled regularly or occasionally, including, but not limited to, schools, *churches*, theaters, auditoriums, funeral homes, stadiums, and similar places of assembly. . . .

A structure for groups of people to gather for an event or regularly scheduled program. Places of public assembly include, but are not limited to, arenas, *religious institutions*, lecture halls, banquet facilities, and similar facilities. . . .

A building or portion of a building used for gathering for such purposes as deliberation, worship, auditorium, *church, or chapel*, dance floor, lodge rooms, conference rooms, dining rooms, drinking establishments, exhibit rooms, or lounges.

Michael Davidson & Fay Dolnick (eds.), *A Glossary of Zoning, Development, and Planning Terms*, AMERICAN PLANNING ASSOCIATION PLANNING ADVISORY SERVICE REPORT Nos. 491/492 at 39-40 (emphasis added). Long Branch does not permit churches as “assembly halls.” See Def. SJM Op. at 5; Apx. 44; Amend. Cmplt ¶ 23; Apx. 149. Unlike every single definition of “assembly hall” provided

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6; Apx. 45; see also *id.* at 9; Apx. 48 (noting that City forbade Mission from “church services/soup kitchens/classes”).

by the American Planning Association, Long Branch only allows assemblies of the secular sort.

Lecture Halls: The City permits “[e]ducational services and colleges,” Ordinance No. 20-6.13(a)(2)(d); Apx. 80, and the attendant assembly in lecture halls, but denies churches, such as the Mission, who wish to offer classes in Bible study, life skills and job skills a similar opportunity. This is unequal treatment:

Suppose, for example, a group of people wished to assemble on a regular basis in Evanston to discuss and hear lectures on classical literature. This group might also wish to have seminars for young people after school or on weekends to expose them to “great books.” These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from Evanston.

*Love Church v. City of Evanston*, 671 F. Supp. 515, 518-19 (N.D. Ill. 1987) (zoning ordinance permitting meeting halls, but not churches, in commercial district impermissibly favored secular assemblies over religious ones), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990), *cert. denied*, 498 U.S. 898 (1990); *id.* at 518 (“As for traditional church use, clearly a land use similar to that is a meeting hall.”).

Restaurants and eating and drinking places: The City allows “restaurants and eating and drinking places” and “delicatessens” in the C-1 District, as well as a use called simply “food,” but prohibits the homeless from assembling in the Mission’s contemplated soup kitchen. Def. SJM Op. at 6; Apx. 45; Ordinance No.

20-6.13(A)(1)(b), (f), (h); Apx. 80. Although a soup kitchen would seem to fall within the category of “food,” the City explicitly forbade the Mission from providing that particular ministry. Def. SJM Op. at 8-9; Apx. 47-48. Both are concerned with feeding people, the only distinction between the two is the clientele. The D.C. federal court easily rejected such disparate treatment:

The Court takes judicial notice that within three blocks of the Church is a Howard Johnsons Restaurant which the Court presumes is open to all, including the rich, poor and the homeless so long as they can afford to pay for their meal. Based on this observation, the Court does not understand how the District of Columbia can distinguish between food that is given away to the poor and food that may be purchased by the same individuals.

*Western Presbyterian v. Board of Zoning Adjustment of the Dist. of Columbia*, 849 F. Supp. 77, 79 (D.D.C. 1994), *appeal dismissed*, No. 94-7104, 94-7189, 1995 WL 118016 (D.C. Cir. 1995).

Apparel stores: Likewise, the Mission seeks to “cloth[e] the ‘naked’” as part of its religious charge. Brown I Decl. ¶ 5; Apx. 334. The Ordinance explicitly permits “Apparel and accessories” uses, but forbids the church from engaging in the same activity with the underprivileged. Ordinance No. 20-6.13(a)(1)(d); Apx. 80.

Professional office/services: The Mission cannot engage in religious counseling, but “professional office/services” are allowed, Long Branch Ordinance Nos. 6-96, 20-96, and assumedly include secular counseling professionals.

Theaters: Equally irrational is permitting theaters and college lecture halls, Ordinance No. 20-6.13(a)(2)(d), (a)(3); Apx. 81, while forbidding religious sermons. Again, lower courts have held that a zoning code that permits theaters but not churches impermissibly favors secular public assembly uses over religious assembly uses:

Vineyard's congregants may permissibly stage (at the subject property) a production of the musical play "Fiddler on the Roof," which includes a scene depicting a traditional Jewish wedding. Vineyard may not, however, host an actual religious wedding at 1800 Ridge under the zoning ordinance.

*Vineyard Christian Fellowship v. City of Evanston*, 250 F. Supp. 2d 961, 976 (N.D. Ill. 2003); *see also Love Church*, 671 F. Supp. at 518 ("Theatres, for zoning purposes, are not unlike churches, in that large groups of people of all ages assemble to participate in a common experiences."). Additionally, the Broadway Handbook further permits a host of other public assemblies in the "Regional Entertainment Commercial land use area" in which the Property falls, including "Performance Art Venues," "Theater workshops," "Clubs showcasing local bands," "Rehearsal rooms," among many others. Broadway Handbook at 6; Apx. 450.

In short, *every single activity* described by the Mission to be engaged in at the Property would be permitted, *but for their religious nature!*<sup>7</sup> As explained

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<sup>7</sup> Not only does the City's Ordinance permit all the non-religious public assembly land uses discussed above as of right, but several actually do exist within

below, neither RLUIPA nor the Constitution permits such patently disparate treatment.

C. Under Both RLUIPA and The United States Constitution, the Government Cannot Favor Assembling for Purposes of Secular Activity, Expression and Association Over Assembling for Purposes of Religious Activity, Expression and Association.

1. *Long Branch's Zoning Ordinance Violates RLUIPA's Equal Terms Provision, 42 U.S.C. § 2000cc(b)(1).*

Long Branch's Zoning Ordinance facially and explicitly violates the Mission's rights under RLUIPA's "Equal Terms" provision. As lower courts have held, the Equal Terms provision codifies "existing Supreme Court decisions under the Free Exercise and Establishment Clauses of the First Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment." *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002) (quotations omitted). Also *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 869 (E.D. Pa. 2002) (same). "The purpose of this section is to forbid governments from prohibiting religious assembly uses

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the zone, as was demonstrated to the court below. See Brown I Decl. ¶ 48-50; Apx. 349-350 (including the "Portuguese Club" fraternal organization, the "Spanish Fraternity of Monmouth County," the "Brookdale Community College Learning Center," the "Seashore Day Camp," the "New Jersey Repertory Company Theater," and the "Monmouth Medical Center Free Clinic").

while allowing equivalent, and often more intensive, non-religious assembly uses.”  
*Ventura County Christian*, 233 F. Supp. 2d at 1246 (quotation omitted).<sup>8</sup>

The “Equal Terms” provision unambiguously sets forth what a plaintiff must show to make out a violation:

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1) (emphasis added). Here, the application is straightforward and the violation is clear.

Land Use Regulation. The City’s zoning ordinance governing what uses are permitted and not permitted in the C-1 District is a “land use regulation” within the meaning of the Act. *See* 42 U.S.C. § 2000cc-5(5).

Religious Assembly or Institution. The City’s land use regulation governing permitted uses in Long Branch’s C-1 district treats the Mission’s proposed church—unmistakably “a religious assembly”—in a manner that forbids it from locating in the C-1 District under any circumstances.

Nonreligious Assembly or Institution. Whether a nonreligious assembly is commercial or non-commercial, profit or non-profit, a City may not afford it better treatment than a religious assembly. What matters is that the uses to be compared

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<sup>8</sup>*See also* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON. L. REV. 929, 976-1000 (2001).

are both “assemblies”; the language of RLUIPA does not further limit what uses may be compared. *See* 42 U.S.C. § 2000cc(2)(b)(1).

The legislative history confirms this clear legislative mandate by listing myriad nonreligious assemblies to be compared with religious ones: “*banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters,*” H.R. REP. No. 106-219, 106th Cong., 1st Sess. 19 (1999) (emphasis added); and “recreation centers [and] *health clubs,*” 146 CONG. REC. S7774-01 at S7777 (daily ed. July 27, 2000) (emphasis added); *see also id.* at S7775 (“[T]he hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly . . . .”). RLUIPA’s Senate sponsors—Senators Kennedy and Hatch—similarly emphasized the need for the Equal Terms provision: “Zoning codes frequently exclude churches in places where they permit *theaters, meeting halls,* and other places where large groups of people assemble for secular purposes.” *id.* at S7775;<sup>9</sup>

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<sup>9</sup> A similar statement appears in the legislative history of the House bill. *Protecting Religious Liberty: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1999) (testimony of Prof. Douglas Laycock, University of Texas Law School) (“[T]hese subsections implement this rule as applied to land use regulation that permits secular assemblies while excluding churches.”). *See also Religious Liberty Protection Act: Hearings on the Religious Liberty Protection Act of 1998 H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1998) (testimony of Prof. W. Cole Durham, Jr.,

*Religious Liberty Protection Act: Hearing on H.R. 4019*, 105th Cong., 2nd Sess. (1998) (testimony of Prof. Laycock) (listing “banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters” as preferred uses). Long Branch’s zoning ordinance permitting such secular assembly uses as assembly halls, health clubs, theatres, lecture halls, municipal buildings and restaurants in the C-1 district (but not churches), *see* Ordinance No. 20-6.13(a); Apx. 80, is thus a paradigmatic example of the type of zoning ordinance Congress sought to address.

The lower court did not dispute (nor could it) the fact that the City’s zoning ordinance allows several nonreligious assemblies in the C-1 District. Instead, the lower court held that the permitted assembly uses were “not comparable” to a church because they were “commercial enterprises.” Pl. SJM Op. at 30; Apx. 34. This injection of an additional requirement (that the Equal Terms provision is violated only if a noncommercial assembly is treated better than a church) appears

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B.Y.U. Law School) (“[I]n accordance with prior law, a community may not . . . deprive religious assemblies of equal access to areas where non-religious assemblies are permitted.”); *Religious Freedom, Hearing on the Religious Liberty Protection Act of 1998 H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1998) (testimony of Steven T. McFarland, Director, Center for Law and Religious Freedom) (“First, *equal access* should be assured. Wherever a community allows places of assembly, like meeting halls, community centers, theaters, schools, or arenas, it must allow churches as a permitted use.”).

nowhere in the text of RLUIPA, and is in direct contradiction to its legislative history. First, the plain language of the Equal Terms provision does not support the lower court’s view. The Act’s text reads: “a nonreligious assembly or institution,” not “a noncommercial assembly or institution.” Moreover, as is clear from the legislative history discussed above, many of the uses cited by Congress as “assemblies” favored over churches are “commercial” in nature. *See, e.g.*, H.R. REP. 106-219, 106th Cong., 1st Sess. 19 (1999) (listing commercial uses including “health clubs,” “gyms,” and “theaters”); *cf. Love Church*, 671 F. Supp. at 519 (“[W]e find the noncommercial/commercial distinction irrelevant.”).<sup>10</sup>

Finally, although not necessary to demonstrate a violation of RLUIPA—the explicit language of the City’s ordinance permitting a number of secular assembly uses is sufficient—the record also reveals uncontroverted evidence of several “noncommercial” assemblies actually located in the C-1 District. For example, it is undisputed that the following nonreligious assemblies are located in the C-1

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<sup>10</sup> Notably, federal courts routinely treat the word “assembly” to include both commercial and non-commercial uses, *see, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933, 95 S. Ct. 2561, 2568, 45 L. Ed. 648, 660 (1975) (describing “any place of assembly” as a “theater, town hall, opera house, as well as a public market place.”); *Love Church v. City of Evanston*, 671 F. Supp. 515, 517 (N.D. Ill. 1987) (identifying theaters as assembly use). Often municipalities make no distinction among “assemblies” based on commercial status. *See, e.g.*, ALAMEDA COUNTY, CAL., GENERAL ORDINANCE § 17.52.920 (“Places of public assembly” include among others restaurants, auditoriums, churches, arenas, theaters, dance halls, and bowling alleys) (available at <<http://www.co.alameda.ca.us/admin/admincode>>).

District: the City of Long Branch Portuguese Club on Broadway,<sup>11</sup> the Spanish Fraternity of Monmouth County at 149 Broadway, the Brookdale Community College Learning Center on the corner of Broadway and Third,<sup>12</sup> the Seashore Day Camp on Second Avenue;<sup>13</sup> and the Monmouth Medical Center Free Clinic at 300 Second Avenue.<sup>14</sup> See Brown I Decl. ¶ 50; Apx. 350; Defendants’ Post-Hearing Submission to Judge Walls; Apx. 543-560 (describing permit for Seashore Day Camp); *id.*; Apx. 568 (listing “Long Branch Portuguese Club” at 191 Broadway as a “tax exempt property”); *id.*; Apx. 568 (listing “N J Repertory” at 179 Broadway as a “tax exempt property”). Although these assembly uses were all part of the

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<sup>11</sup> The City is certainly aware of the existence of the Club. See CITY OF LONG BRANCH, NEW JERSEY, OFFICE OF COMMUNITY AND ECONOMIC DEVELOPMENT, CONSOLIDATED ANNUAL PERFORMANCE REPORT, PROGRAM YEAR 2001 (available at <<http://www.longbranch.org/OCED/2001CAPER.pdf>>) (“The [City of Long Branch Office of Community and Economic Development] staff meets with members of the City of Long Branch Portuguese Club and other ethnic groups. Plans were discussed regarding the involvement of members of the Portuguese Community in community activities.”).

<sup>12</sup> As described by Brookdale College, its Long Branch Center engages in the following activities: “Displaced Homemakers Program provides services to women who have lost their primary source of income due to divorce, separation, death or disablement and as a result must obtain or upgrade their skills for entry or re-entry into the workforce. Career development, job counseling and other support services are provided.” Brookdale County College of Monmouth, Office of Urban Services (available at <<http://www.brookdale.cc.nj.us/content.php?ID=362>>) (emphasis added).

<sup>13</sup> Seashore Day Camp describes itself as “giving campers fun-filled summers they remember the rest of their lives.” Seashore Camp, “About Seashore . . .” (available at <<http://www.seashorecampandschool.com/html/welc.htm>>).

<sup>14</sup> Monmouth Medical Center is “a 527-bed community teaching hospital,” according to its web site. Monmouth Medical Center, “About Us” (available at <[http://www.sbhcs.com/hospitals/monmouth\\_medical/ABOUT/index.html](http://www.sbhcs.com/hospitals/monmouth_medical/ABOUT/index.html)>).

record, the lower court chose to ignore this evidence and instead asserted that there was no “evidence as to the type of assemblies Long Branch allows in the C-1 zone.” Pl. SJM Op at 31; Apx. 35.

Disparate Treatment. Churches such as the Mission are treated “on less than equal terms” than numerous nonreligious assemblies. As discussed *supra*, churches are prohibited in the C-1 zone, but such nonreligious assembly uses as assembly halls, theatres, health clubs, gyms, restaurants, bowling alleys, municipal buildings, and colleges (and their attendant lecture halls) are permitted.<sup>15</sup> *See* Ordinance No. 20-6.13(a); Apx. 80. In addition, the City’s recently enacted Long Branch Redevelopment Plan further entrenches the unequal treatment of churches compared to other secular assemblies in the C-1 District by permitting as of right such assembly uses as community halls, exhibition halls, libraries, community clubs, community colleges, auction houses, and dance clubs. *See* Broadway Handbook; Apx. 444.

Thus, there can be no question that Long Branch treats “a religious assembly . . . on less than equal terms with a nonreligious assembly,” in violation of RLUIPA’s “Equal Terms” provision. 42 U.S.C. § 2000cc(b)(1). Because “the statute provides no rational basis or strict scrutiny ‘escape hatch’ for a . . .

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<sup>15</sup> As discussed above, the lower court’s insistence on viewing the Ordinance “as a whole,” as opposed to analyzing the particular uses permitted and forbidden in the Property at issue runs contrary to this Court’s controlling precedent in *Congregation Kol Ami*. *See supra*, § I(a).

violat[ion of] its provisions,” failure to accord a religious assembly or institution equal treatment with a nonreligious assembly or institution “must be judged on a ‘strict liability’ standard.” *Christ Universal Mission Church v. City of Chicago*, No. 01C1429, 2002 U.S. Dist. LEXIS 22917 at \*18 (N.D. Ill. Sept. 13, 2002). The Ordinance fails that standard.

2. *Long Branch’s Zoning Ordinance Violates the Free Exercise Clause.*

The lower court’s denial of preliminary injunction must also be reversed on the ground that Long Branch’s Ordinance violates the Free Exercise Clause of the First Amendment by treating religiously motivated behavior worse than behavior motivated by secular concerns. Both the Supreme Court and this Court have repeatedly held that the Free Exercise Clause requires “neutrality” with respect to religion. *Employment Div. v. Smith*, 494 U.S. 872, 877-80 (1990) (describing bans on “assembling with others . . . only when they are engaged in for religious reasons” as unconstitutional); *id.* at 877 (the “government may not . . . impose special disabilities on the basis of religious . . . status” (citations omitted)). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court held that a law “lacks facial neutrality if it refers to a religious practice

*without a secular meaning discernable from the language or context.*” *Id.* at 533.<sup>16</sup>

The Free Exercise Clause protects religiously motivated conduct from being targeted for worse treatment than secular conduct. *Lukumi*, 508 U.S. at 532 (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” (emphasis added)).

This Court’s decisions in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (“*FOP*”), *cert. denied*, 528 U.S. 817 (1999), and *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2609 (2003), provide the controlling interpretation of the *Lukumi / Smith* standard. *FOP* presented the question of whether a government employer’s rule

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<sup>16</sup> The Supreme Court has stressed that, “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates *or prohibits conduct because it is undertaken for religious reasons.*” *Lukumi*, 508 U.S. at 532 (emphasis added). The Court has also noted that:

the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, . . . . It would be true . . . that a State would be “prohibiting the free exercise [of religion]” if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, . . . . It would doubtless be unconstitutional, for example, to ban the casting of “statues that are to be used for worship purposes” . . . .

*Smith*, 494 U.S. at 877-78. Likewise, it is unconstitutional to ban the assembling of people for worship purposes.

permitting beards for medical reasons (but denying them for any other) triggered heightened scrutiny for failure to make exceptions for religious reasons. *FOP*, 170 F.3d at 365-66. The Court applied heightened scrutiny because it found the law to target conduct based on its religious motivation:

“[I]t is clear from [*Smith* and *Lukumi*] that the Court’s concern was the prospect of the government’s deciding that *secular motivations are more important than religious motivations*. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

*Id.* at 365 (emphasis added) (citation omitted). Here, as in *FOP*, groups of people are permitted to assemble in order to watch a movie or a play, to eat at a restaurant or drink at a pub, to listen to lectures at a college, or to receive professional services. And under the LBBRP, they can dance, sip coffee at a “Late Night Café,” play billiards or exercise, and much more. In other words, in the words of the American Planning Association, Long Branch permits “groups of people to gather for an event or regularly scheduled program,” for many, many purposes—just not for religious ones. Whereas in *FOP*, there was only one exception from an otherwise-universal policy against the wearing of beards, here people may assemble for numerous secular reasons in Long Branch’s C-1 District.

In *Tenaflly Eruv Ass’n*, this Court again struck down a policy that treated some secular motivations for activity more favorably than religious motivations.

309 F.3d at 169-170 (holding that policy forbidding religious *lechis* placement on utility poles, while permitting secular materials, violated the Free Exercise Clause). The Court held that such a rule violates the “neutrality” requirement of *Smith* and *Lukumi*. *See id.* at 169 (“[The plaintiffs] ask only that the Borough not invoke an ordinance from which others are effectively exempt to deny plaintiffs access to its utility poles simply because they want to use the poles for a religious purpose.”). Similarly, the Appellants here ask only that this Court prevent the City from “invok[ing] an ordinance from which other [assembly uses are] exempt to deny plaintiffs access to [their property] simply because they want to use the [property] for a religious purpose.”

Furthermore, a law that categorically favors some non-religious entities or activity over religious entities or activity fails the neutrality requirement. The fact that the law may also disfavor some non-religious entities is irrelevant. This principle is illustrated by the Supreme Court’s holding in *Lukumi*. The Court held that an ordinance that permitted the slaughter of animals within city limits for secular purposes (*e.g.*, for food consumption), *see id.*, 508 U.S. at 553, but prohibited the sacrifice of animals for certain religious reasons, lacked neutrality. *Id.* at 542. Significantly, the Court reached this conclusion even though the unlawful ordinance also adversely impacted those who wanted to ritually kill animals for purely nonreligious reasons. Similarly, *FOP* also makes clear that a

law *fails* neutrality where it favors some nonreligious entities over religious entities, even if other nonreligious entities are also treated as badly as the religious entities. That case involved only one secular exemption—for medical reasons—and prohibited beards for any other secular or religious reason. *Cf. Vineyard Christian Fellowship of Evanston*, 250 F. Supp. 2d at 976 (noting that “just because other, non-religious uses were also prohibited from the district, does not mean the ordinance does not classify on the basis of religion.”); *Love Church*, 671 F. Supp. at 517 (holding that “[w]hen legislation burdens members of a class entitled to protection under the Fourteenth Amendment, the fact that the legislation also burdens members of unprotected classes is irrelevant.”).

In rejecting the Mission’s free exercise claims, the court below held simply that Long Branch’s laws are neutral because the object of the Zoning Ordinance and special use provisions is to regulate land use and development. Pl. SJM Op. at 13; Apx. 17. This *non sequitur* persuaded neither the Supreme Court in *Lukumi*, 508 U.S. at 535-39 (rejecting city’s interests in protecting the public health and preventing cruelty to animals), nor this Court in *FOP* and should not be persuasive here. Simply because the City’s asserted purpose may be neutral, it does not automatically lead to the conclusion that the means employed are “neutral” and “generally applicable.” *See Lukumi*, 508 U.S. at 543 (“The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that

endangers these interests in a similar or greater degree than Santeria sacrifice does.”).

In ruling that Long Branch’s Ordinance was “neutral” and “generally applicable,” the District Court ignored both the existence of various permitted uses in the Ordinance and facts presented to it about actual existing uses in the District, and instead relied on a circular argument that would deprive churches of *any* First Amendment protection in *any* circumstances. The court held that “[a]ll property owners . . . must apply for a variance to use property within the C-1 Commercial District for purposes not specifically authorized by the Ordinance.” Pl. SJM Op. at 8; Apx. 12. *Of course* a land use is not permitted in the district if the Ordinance does not list it as a permitted use. Such a tautology does not render a law “neutral.” If the Ordinance were to read “Any and all land uses are permitted except for churches,” or even “Any and all land uses are permitted except for Methodist churches,” according to the district court’s standard, such an ordinance would still pass muster because any “property owners must apply for a variance to use property . . . for purposes not specifically authorized . . . .” The relevant analysis, however, is of the nature of the distinctions between permitted and non-permitted uses. *See, e.g., Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221,1226 (9<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 999 (1990); ; *Columbus Park Congregation of Jehovah’s Witnesses, Inc. v. Board of Appeals*, 25

Ill. 2d 65, 73, 182 N.E.2d 722, 726 (1962) (reasoning that “business continuity would likewise be interrupted by a dance hall, crematory, mausoleum or trade school, all uses permitted in this B4 district. We are unable to see how the use as a church is more harmful to adjacent stores than the aforementioned permitted uses.”).<sup>17</sup>

The district court’s final justification—that “religious organizations are allowed to use property in many other zones,” Pl. SJM Op. at 8; Apx. 12—is wholly unavailing. “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schad v. Borough of Mt. Ephraim*, 452 U.S. at 77. See also *Islamic Center of Mississippi v. City of Starkville, Mississippi*, 840 F. 2d 293, 299 (5<sup>th</sup> Cir. 1988) (“And a city may not escape the constitutional protection afforded against its

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<sup>17</sup> Several lower courts have applied this principle. See *W. Presbyterian Church*, 862 F. Supp. at 546 (“It seems rather incongruous that no objection could be raised if a needy person can buy his or her food, but it becomes inappropriate if that needy individual can obtain food at no cost from a benevolent source.”); *Cam v. Marion County*, 987 F. Supp. 854, 863 (D. Or. 1997) (“A weekly poker game involving the same neighbors is not a prohibited use of high-value farmland. . . . Presumably, Saturday night square dances in the barn would survive scrutiny by the building inspector . . . .”). In a case closely analogous to the one at bar, a federal court in Illinois ruled that discriminating against churches while permitting other similar uses violated the Constitution: “This group might also wish to have seminars for young people after school or on weekends to expose them to “great books.” These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from Evanston.” *Love Church*, 671 F. Supp. at 518-19.

actions by protesting that those who seek an activity it forbids may find it elsewhere.”). Similarly, a regulation prohibiting religious speech from a public forum while permitting nonreligious speech could not be justified by referencing alternative channels of communication. And, as discussed above, the Third Circuit has clearly held that the relevant analysis for constitutional purposes is properly only of the zone at issue. *Congregation Kol Ami*, 309 F.3d at 137.

Since Long Branch’s ordinance forbidding churches from its commercial districts while permitting a host of other nonreligious assembly land uses is not neutral or generally applicable, it is subject to strict scrutiny review under the Free Exercise Clause.<sup>18</sup> *Tenaflly Eruv Ass’n*, 309 F.3d at 165 (“[I]f the law is not neutral (*i.e.*, if it discriminates against religiously motivated conduct) or is not generally

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<sup>18</sup> Since Long Branch’s zoning ordinance both prevents Appellants from communicating to their intended audience, and discriminates against the religious nature of their speech, therefore implicating the Free Speech Clause, *see infra* § I(C), this is also a situation that implicates the Church’s “hybrid rights.” *See Tenaflly Eruv Ass’n*, 309 F.3d at 165 (“Strict scrutiny may also apply when a neutral, generally applicable law incidentally burdens rights protected by ‘the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . .’” (quoting *Smith*, 494 U.S. at 881)); *Cornerstone Bible Church v. City of Hastings*, 948 F. 2d 464, 468 (8<sup>th</sup> Cir. 1991); *Vineyard Christian Fellowship of Evanston*, 250 F. Supp. 2d at 989 (“Here, Vineyard has demonstrated that its free speech and equal protection rights have been violated, and therefore the case is arguably analogous to those cited in *Smith* as involving hybrid rights.”). The Court below recognized the applicability of the hybrid rights doctrine, but relied on its flawed decision under the Free Speech Clause to justify its rejection of hybrid rights in this case. Pl. SJM Op. at 9-10; Apx. 13-14.

applicable (*i.e.*, if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies”).

Appellees cannot meet that test. The City’s sole asserted interest in prohibiting churches in the C-1 District—“revitalizing the commercial district”—must fail as both legally and factually insufficient. The City produced no evidence other than this bare assertion in response to the Mission’s Motion for Summary Judgment and Preliminary Injunction.

Courts have repeatedly held that “in this highly sensitive constitutional area, ‘only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’” *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”). Only “compelling,” and not even “significant,” governmental interests will rise to the requisite level. *See, e.g., Lukumi*, 508 U.S. at 546.

In the church zoning context, lower courts have held either that interests such as Long Branch’s are not compelling, or that churches do not injure such interests. In *Cornerstone Bible Church*, the Eighth Circuit said that “[a] church provides services to members and sometimes may engage in merchandising or quasi-commercial activity.” 948 F.2d at 470 n.9. Economic “[b]light’ can constitute an ‘esthetic harm’ . . . . The Supreme Court has held that esthetic

concerns are substantial governmental interests. . . . It is, however, only a compelling interest that can justify burdening [a church’s] religious exercise rights.” *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (citations omitted). *See also Love Church*, 671 F. Supp. at 519 (“The absence of commercial exchange in the case of a church does not threaten any compelling interest of Evanston.”); *Keeler v. Mayor & City of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (holding as not “compelling” the City’s stated interests in: “safeguarding the heritage of the City . . . ; stabilizing and improving property values . . . ; fostering civic beauty; strengthening the local economy”).

Furthermore, the fact that other churches and non-religious commercial and non-commercial assembly uses currently exist in the C-1 District further undermines any asserted interest in preventing the Mission from locating there. *See Tenafly Eruv Ass’n*, 309 F.3d at 172 (“Because the Borough has tolerated equally permanent house numbers, it hardly has a compelling interest in refusing to allow the inconspicuous *lechis* on the ground that they are permanent.”).<sup>19</sup> In fact,

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<sup>19</sup> Ironically, the court below—in attempting to demonstrate that the Mission is not engaged in religious speech—describes churches as only engaged in commercial speech: “[T]he operation of a business, including a charitable business, is subject to zoning laws, even if the business makes it money by engaging in conduct with the core of the First Amendment.” Pl. SJM Op. at 12; Apx. 16. If the Mission is engaged in a “business,” then why does Long Branch exclude it from the commercial district?

in permitting the Missionary Pentecostal Church of God, to locate in the C-1 District, the City said that “granting [its approval] will not cause substantial detriment to the public good and will not substantially impair the intent and purpose of the zoning ordinance and zoning plan.” Resolution of the Zoning Board of Adjustment of the City of Long Branch, attached to Defendants’ Post-Hearing Submission to Judge Walls (May 23, 2001); Apx. 499; *see also id.*; Apx. 549 (same for Seashore Day Camp).

Even if Defendants had a compelling reason to forbid churches in C-1 Districts (which they do not), they must “narrowly tailor” their Ordinance to meet that goal. *See Lukumi*, 508 U.S. at 531-32; *FOP*, 170 F.3d at 366 (finding no-beard policy not “tailored to serve that interest”); *Tenafly Eruv Ass’n*, 309 F.3d at 172 (“[E]ven if the Borough had a compelling interest in preventing permanent fixtures on its utility poles, its decision to remove the *eruv* while allowing the house numbers is not narrowly tailored to promote that interest.”). Far from doing that, the City has done the equivalent of using a sledgehammer to kill an ant. The City has not demonstrated (nor could it) that there is no other way to maintain the commercial health of the City without banning the Mission in the C-1 district.

3. *Long Branch's Zoning Ordinance Violates the Free Speech Clause.*

Land use laws that regulate expressive activity<sup>20</sup> are subject to the constraints of the First Amendment. *See, e.g., City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-15 (1975) (holding unconstitutional zoning restrictions on drive-in movie theaters). At a *minimum*, zoning laws must not be based on the content of the expression they suppress. *See Renton*, 475 U.S. at 48; *Erznoznik*, 422 U.S. at 215; *Young v. American Mini Theaters*, 427 U.S. 50, 68 (1976) (noting general First Amendment “prohibition of regulation based on the content of protected communication”). To be content-neutral, zoning ordinances must avoid *both* prohibiting expression because of its subject-matter, *and* prohibiting expression because of its viewpoint on a subject-matter. *See Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm’n of New York*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but also to prohibition of public discussion of an *entire topic*.”) (emphasis added).

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<sup>20</sup> It is indisputable that churches, at least as much as adult entertainment uses, involve expressive activity. *See, e.g., Vineyard Christian Fellowship of Evanston*, 250 F. Supp. 2d at 980-81 (citing *Cornerstone Bible Church*, 948 F.2d at 468-71, for its holding that zoning ordinances which regulate church land use “restrict[] speech and not non-expressive conduct.”).

The court below correctly noted that the Supreme Court has held that “when a zoning ordinance encroaches upon a protected liberty, ‘it must be narrowly drawn and further a sufficiently substantial government interest.’” Pl. SJM Op. at 6; Apx. 10 (quoting *Schad*, 452 U.S. at 68). However, it then inexplicably decided that *Employment Div. v. Smith*, 494 U.S. 872 (1990), somehow reversed the holding in *Schad*, presumably only in cases involving religion. Pl. SJM Op. at 6-7; Apx. 10-11 (“Thus, the standard set out in *Schad* is no longer controlling in all circumstances.”). The standard propounded by the district court is as unfounded as it is discriminatory.

First, there has never been any suggestion by this or any other court that *Smith* somehow limits *Schad*. The reason for this is obvious: *Schad* is a free speech decision; *Smith* is a free exercise decision.

Second, such an interpretation of *Schad* and *Smith* as described by the court below would have the effect of providing religious speech with less protection than any other form of speech. This cannot be countenanced by the First Amendment. In a recent string of cases, the Supreme Court has found that restrictions on expressive conduct based on religion violate the Free Speech Clause because they are based on viewpoint rather than subject-matter. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108-10 (2001) (allowing secular assemblies and secular messages but prohibiting religious assemblies and religious messages in public

facility violates Free Speech Clause); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831-35 (1995) (holding that Free Speech Clause precludes university that pays printing costs for student publications from denying funding based on publication’s religious speech); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that Free Speech Clause forbids denying church access to building to disseminate religious message when comparable secular groups had access to disseminate secular messages). Not one of these decisions even *suggests* that government regulations are content-neutral when they prohibit religious expression but allow secular expression in a similar context; the only controversy surrounded what type of content discrimination was involved—subject-matter or viewpoint.<sup>21</sup> This applies equally to the regulation of land used for expressive purposes. *Cf. DeBoer v. Village of Oak Park*, 267 F.3d 558, 569-70 (7<sup>th</sup> Cir. 2001) (holding that permitting the use of a village hall for a “civic program or activity” but prohibiting its use by a prayer group was an impermissible viewpoint-based restriction on speech).

Attempting to bolster its holding that the Free Speech clause permits singling out religious expression for special disfavor by zoning laws restricting

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<sup>21</sup> The lower court’s attempt to cloak Long Branch’s Ordinance in a veil of neutrality fails here as it did in the Free Exercise context: arguing that “All property owners who seek to use land within the C-1 zone for purposes other than that specified in the Ordinance must seek a variance,” Pl. SJM Op. at 13; Apx. 17, is circular, at best. The relevant comparison is between the uses permitted and those forbidden.

religious assembly but not secular assembly uses, the lower court next makes the outrageously broad statement that “[t]he Third Circuit has unequivocally held that the act of constructing houses of worship does not implicate the Free Speech Clause.” Pl. SJM Op. at 11; Apx. 15 (citing *Tenaflly Eruv Ass’n*, 309 F.3d at 163, and *Congregation Kol Ami*, 309 F.3d 120 (3d Cir. 2002) (no pinpoint cite)). This description of Circuit precedent fails for several reasons.

First, it is simply not true. The Third Circuit cases cited by the court were not church zoning/Free Speech cases. *Congregation Kol Ami* was an Equal Protection case; there was no Free Speech issue involved in that appeal. And *Tenaflly* did not involve any effort by a church to assemble for worship and proclaim a message at a certain location. Instead, it concerned whether a city could permissibly forbid a religious group from establishing an *eruv* by placing *lechis* consisting of black plastic strips, on public utility poles. The Court found that the Free Speech clause was not implicated because there was “no evidence that Orthodox Jews receive a message or ascertain the *eruv*’s boundaries by looking at the *lechis*.” *Tenaflly Eruv Ass’n*, 309 F.3d at 162. The same cannot be said about the Mission, whose purpose is “To proclaim publicly and at scheduled meetings the gospel of Jesus Christ. To offer fellowship, inspiration, training and materials in the pursuit of the great commission as found in the Holy Bible, . . . .” Lighthouse Institute for Evangelism Bylaws Apx. 185.

Second, this case does not involve “constructing houses of worship,” but rather the *assembling of people for expressive purposes* that happen to be religious in nature. The building already exists; it is the use by a church for *religious* expression that is prohibited.

Third, and perhaps most importantly, the breadth of the lower court’s holding that the Free Speech Clause is not even “implicated” by zoning laws restricting the location of houses of worship betrays its irrationality: If a zoning ordinance prohibited assemblies of people from conducting weddings, or limited the number of people that could attend religious services, or permitted the showing of secular, but not religious films, or prohibited discussing the Resurrection, could anyone dispute that the Free Speech is at least “implicate[d]”?<sup>22</sup>

Long Branch’s discriminatory Ordinance not only “implicates” the Free Speech Clause, it strikes directly at its heart. The lower court attempted to avoid this conclusion by asserting that the “operation of a house of worship does not equate with ‘religious speech,’ any more than the operation of a shoe store equates

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<sup>22</sup> Perhaps realizing the weakness of its holding, the lower court did not even acknowledge that the Mission was seeking injunctive relief on its Free Speech claim. While the lower court cites *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8<sup>th</sup> Cir. 1991), in support of its Free Exercise section—in fact, it described *Cornerstone Bible Church* as “a case with circumstances most analogous to our case,” Pl. SJM Op. at 8; Apx. 12—it dismisses the favorable Free Speech holding of that case by weakly arguing that summary judgment is not appropriate at this stage in the case at bar. Pl. SJM Op. at 15; Apx. 19 (“Plaintiffs are not entitled to summary judgment at juncture [sic].”). That statement ignored the fact that Plaintiffs had also moved for a preliminary injunction.

with commercial speech.” Pl. SJM Op. at 12; Apx. 16. Once again, this argument fails.

As an initial matter, this assertion simply ignores that, by their very nature, churches like the Mission and other houses of worship are in the “business” of *expression*. See, e.g., Def. SJM Op. at 2; Apx. 41; Amend. Cmplt. ¶ 1; Apx. 144. (purpose of the Mission is to “liv[e], practice[e], and *proclaim* the teachings of the New Testament and the gospel of Jesus Christ.”) (emphasis added). Zoning laws that limit assembly for worship and religious speech at a particular location restrict protected expression and thereby invoke the protections of the Free Speech Clause. In this regard, houses of worship are like other entities such as newspapers, see *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 761 (1988) (holding that “newspapers are in the business of expression” and subjecting ordinance limiting the location of newsracks to scrutiny under the Free Speech Clause), or, ironically, adult entertainment, see *Schad*, 452 U.S. at 66-69 (adult entertainment enterprises are in the business of expression), that courts have recognized are entitled to protection under the Free Speech Clause when the government imposes zoning or other restrictions that impede their ability to locate and disseminate their message.

Moreover, the lower court’s assertion overlooks the fact that Long Branch’s zoning ordinance singles out *religious* expressive activity for special disfavor.

Private entities may purchase any property that exists in Long Branch’s C-1 District. They may use it for a number of other assembly activities, including what Long Branch describes as an “assembly hall.” They may also invite their members or the public to assembly there and engage in *expressive* activity. But if they use the property for worship services proclaiming a *religious* message, they run afoul of Long Branch’s Ordinance, which forbids such uses outright. The lower court’s error is obvious. As described above, the Supreme Court has repeatedly held both that land use regulations that restrict expressive activity implicate the protections of the Free Speech Clause, and that the government may not favor nonreligious speech over equivalent religious speech. Combined, these prohibitions bar land use laws that prefer nonreligious expressive activity to religious expressive activity, and therefore represent impermissible content- and viewpoint-based discrimination.<sup>23</sup>

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<sup>23</sup> Even were the Ordinance viewed as content-neutral, it would still fail the applicable “intermediate scrutiny.” *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (government may impose reasonable time, place, and manner restrictions if they (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for the communication of the information). The City has not advanced any substantial interests for censoring the Mission’s speech, let alone demonstrated that its zoning ordinance’s flat prohibition of churches in the C-1 District employs narrowly tailored means for advancing any such interests. Nor has the City met its burden of showing the availability of ample alternative avenues of communication in the City that would allow the Mission to communicate its religious message to the poor and disadvantaged that the Church seeks to reach with its message in the C-1 District.

In sum, the lower court erred in failing to hold that Long Branch’s zoning ordinance forbidding assembly for religious expression in the C-1 District, while allowing a wide variety of secular assembly for secular expression, violates the Free Speech Clause’s prohibition of content discrimination.

4. *Long Branch’s Zoning Ordinance Violates the Equal Protection Clause.*

The fundamental protection guaranteed under the Equal Protection Clause—*i.e.*, “that all persons similarly situated should be treated alike,” *Cleburne*, 473 U.S. at 439—also requires a holding that Long Branch’s failure to treat churches as well in the C-1 District as similarly situated nonreligious assembly uses is unlawful.<sup>24</sup> In *Cleburne*, the Supreme Court described the inquiry a court should undertake in assessing whether a zoning regulation unreasonably limits similarly situated land

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<sup>24</sup> The lower court rejected the Appellants’ Equal Protection claim based on the mistaken premise that since “churches are permitted in other zones in Long Branch without a variance,” Pl. SJM Op. at 19; Apx. 23, there was no violation. However, this conclusion rested on the lower court’s mistaken premise, as discussed *supra*, *see* § I(A), that the proper analysis for an Equal Protection claim is to consider how churches are treated throughout the jurisdiction as opposed to how churches are treated in the C-1 District. Again, as discussed *supra*, that approach disregards this Court’s holding in an Equal Protection/zoning case that “the first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is *similarly situated to other uses* that are either permitted as of right, or by special permit, *in a certain zone.*” *Congregation Kol Ami*, 309 F.3d at 137 (emphasis added); *see also supra* § I(A) (citing *Cleburne* and *Cornerstone Bible Church*).

uses.<sup>25</sup> In assessing the rationality of the challenged land use regulation, the Court dictated that the relevant inquiry was whether the home for the mentally retarded “would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.” *Id.* at 448. Examining each of the City’s asserted interests, the Court concluded that the permitted uses of property posed an equal or greater threat to those interests than the prohibited use. Accordingly, the Court held it was irrational to allow the permitted uses to locate freely in the City, but not the home for the mentally retarded.

*Cleburne*’s holding that zoning laws that treat similarly situated land uses (even those that do not implicate fundamental rights) unequally fail rational basis scrutiny has been repeatedly applied in cases challenging zoning ordinances regulating the use of land for religious assembly.<sup>26</sup> For example, in *Congregation*

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<sup>25</sup> It is telling that only once does the lower court cite *Cleburne* (and then only for the general proposition that the Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike,” Pl. SJM Op. at 16; Apx. 20), and *nowhere* does it cite the controlling authority in this Circuit on church/zoning Equal Protection law, *Congregation Kol Ami*. (The court was certainly aware of the decision, but treated it as a Free Speech or Free Exercise case, Pl. SJM Op. at 11; Apx. 15.)

<sup>26</sup> In addition to the requirement that similarly situated uses be treated the same way, the Equal Protection Clause prohibits government action infringing fundamental rights or based on suspect classifications such as religion. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (classification is presumptively unconstitutional if it “trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage”); *see J.W. v. City of Tacoma*, 720 F.2d 1126, 1128 (9<sup>th</sup> Cir. 1983) (“Constitutional scrutiny of zoning regulations is heightened, however, when the regulations infringe a fundamental

*Kol Ami*, this Court expressly reaffirmed *Cleburne*'s holding that "similarly situated uses"—including religious uses—must be treated equally unless they "would threaten legitimate interests of the city *in a way that other permitted uses . . . would not.*" *Congregation Kol Ami*, 309 F.3d at 137 (quoting *Cleburne*, 473 U.S. at 448) (emphasis in original). See also *Cornerstone*, 948 F.2d. at 471 (applying *Cleburne* to zoning ordinance permitting other assembly uses, but not churches, in a particular zoning district); *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221 (9<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 999 (1990) (applying *Cleburne* to determine whether church was treated differently from other assembly uses such as schools); *Vineyard Christian*, 250 F. Supp. 2d at 976 (ordinance forbidding churches in a zone, but allowing similarly situated non-religious assembly uses such as theatres and cultural organizations groups impermissibly classifies on the basis of religion in violation of the Equal Protection Clause); *Christ Universal Mission*, 2002 U.S. Dist. LEXIS 22917, at \*17 (holding that Equal Protection demands that "all persons similarly situated should be treated alike" and finding that community centers and churches were "uses [that] are

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interest, or discriminate against a suspect class.") (citations omitted). Although the mere use of the term "church" does not necessarily implicate a suspect classification, differential treatment of assembly uses based on religion certain does. And the rights to religious exercise, speech, and assembly constrained here by the City's zoning laws are unmistakably fundamental. *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right.").

similar” and that there was therefore no rational basis for permitting one but not the other in a particular zoning district);<sup>27</sup> *Love Church*, 671 F. Supp. at 518-19 (zoning ordinance forbidding churches in a zone, but allowing similarly situated non-religious assembly uses such as meeting halls and theatres impermissibly “classifies on the basis of religion” in violation of the Equal Protection Clause); *Ventura County Christian*, 233 F. Supp. 2d at 1247, 1251 & n.20 (holding that Equal Protection inquiry under *Cleburne* is “whether defendants have treated plaintiffs in an unequal manner to similarly situated entities”); *Cam v. Marion County*, 987 F. Supp 854, 859 (D. Or. 1997) (no “legitimate or rational . . . state interest” advanced for prohibiting regular use of agricultural building for religious worship, but allowing other secular assemblies). *Cf. North Shore Unitarian Soc’y v. Plandome*, 109 N.Y.S.2d 803, 804 (N.Y. Sup. Ct. 1951) (ordinance unreasonably prohibits churches while allowing “village and municipal buildings, railroad stations, public schools, and clubhouses”).

Indeed, the principle that the Equal Protection Clause demands that zoning ordinances treat churches at least as well as other similarly situated assembly uses

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<sup>27</sup> The court in *Christ Universal Mission* also noted that in light of its holding that there was no rational basis under the Equal Protection Clause for prohibiting a religious use of property (a church) but permitting a similar, nonreligious use of property (e.g., a community center), it was unnecessary to apply RLUIPA’s “more exacting standard[,]” *id.* at 19, of “strict liability,” *id.* at 18, to the city’s failure to treat a religious assembly on equal terms with a nonreligious assembly.

is so well established that it has been enshrined in two leading zoning law treatises. *See* 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING, § 20.01, at 20-5 (4th ed. 1985) (noting that “courts have considered the exclusion of churches from particular residence districts to be invalid as a denial of equal protection since other nonresidential uses, equally or even more abrasive, such as schools, colleges, public libraries, museums, clubhouses, and the like existed therein or were permitted therein.”); 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 25.131.30, at 489 (3d ed. 2000) (noting that “a zoning ordinance requiring a special use permit to operate a church when it does not require such permits to operate community centers, meeting halls, and other establishments similarly situated” violates equal protection).

A straightforward application of the *Cleburne* Equal Protection analysis leads inescapably to the conclusion that Long Branch’s zoning ordinance does not treat churches such as the Mission as well as similarly situated assembly uses.<sup>28</sup> This is most obviously seen in the fact that assembly halls are permitted in the C-1 District, *see* Ordinance No. 20-6.13(a)(3); Apx. 81, but churches are not.

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<sup>28</sup> As described above, churches are clearly “similarly situated” to assembly halls and the other places of public assembly permitted in the C-1 district. *See* A GLOSSARY OF ZONING, DEVELOPMENT, AND PLANNING TERMS, *supra*, at 39 (“Assembly hall . . . A meeting place at which the public or membership groups are assembled regularly or occasionally, including, but not limited to, schools, churches, theaters, auditoriums, funeral homes, stadiums, and similar places of assembly.” (emphasis added)).

Assembly halls are similarly situated to churches; indeed the term “assembly hall,” as defined by the American Planning Association, includes assembly for religious purposes. An assembly hall is “[a] building or portion of a building in which facilities are provided for civic, educational, political, religious or social purposes”; “A meeting place at which the public or membership groups are assembled regularly or occasionally”; “A structure for groups of people to gather for an event or regularly scheduled program”; and “A building or portion of a building used for gathering.” AMERICAN PLANNING ASSOCIATION PLANNING ADVISORY SERVICE REPORT Nos. 491/492, *supra*, at 39-40 (emphasis added); *see also* WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989) (“assembly . . . 1. a number of persons gathered together, usually for a particular purpose, whether religious, political, educational, or social.”).

As these definitions make clear, *but for* the special designation of “church,” the Mission’s use of the Property—which involves groups of people gathering for a regularly scheduled program—would be an “assembly hall” and a permitted use in the C-1 District.<sup>29</sup> Thus, by permitting “assembly halls” but prohibiting churches in the C-1 District, Long Branch explicitly and blatantly treats similarly

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<sup>29</sup> In addition to the periodic assemblies of people at religious services, the other uses the Mission seeks to engage in—a soup kitchen, a clothing ministry, providing life skills and Bible classes, etc.—all have their equivalent secular counterparts (restaurant, apparel stores, colleges) which are permitted as of right in the district. *See supra* § I(B).

situated land uses unequally. The same is true of the City's decision to prohibit churches, but allow theatres, schools, the Portuguese Club, and all the other similarly situated uses discussed *supra*, § I(B), in the C-1 District.

That Long Branch's Ordinance governing permitted uses treats similarly situated uses unequally is also made clear by examining the Ninth Circuit's decision in *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221 (9<sup>th</sup> Cir. 1990). In that case, a church challenged an ordinance requiring "all places of public assembly," including churches, to obtain a conditional use permit. *Christian Gospel*, 896 F.2d at 1225-26. The court held that no Equal Protection violation was shown, but only because "[t]he Church was treated no differently than a school or community center would have been." *Id.* The court reasoned that because "all forms of public assembly" had the potential to bring "noise and traffic problems to the neighborhood," it was permissible under the Equal Protection clause to treat a church identically to all other public assemblies. *Id.* (emphasis added). Here, churches are not treated identically to all other assemblies. Instead, as discussed *supra*, churches are treated worse than a number of assemblies, including schools, *see* Ordinance No. 20-6.13(a)(2)(d) (permitting "Educational services and colleges" in Long Branch's C-1 District), one of the assembly uses the *Christian Gospel* court found to be similarly situated to churches as a *matter of law*.

Because the City's Ordinance treats similarly situated uses unequally, it can only be sustained against an Equal Protection challenge if churches "threaten legitimate interests of the city in a way that other permitted uses . . . would not." *Cleburne*, 473 U.S. at 448. However, the lower court simply failed to discuss (and the did not City offer) any "legitimate" interests that would be threatened by churches in a way that would not also be threatened by secular assembly halls, theatres, schools, the Portuguese Club or any of the other existing or permitted places of public assembly in the C-1 District.<sup>30</sup>

Accordingly, the lower court erred in holding that the City's decision to permit assembly halls, theaters, schools, and other secular assembly uses, but not churches in the C-1 District satisfies the Equal Protection Clause's requirement that "that all persons similarly situated should be treated alike," *Cleburne*, 473 U.S. at 439.

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<sup>30</sup> Significantly, the depth of the unequal treatment of churches under Long Branch's ordinance is even more pronounced than that of homes for the mentally handicapped in *Cleburne*. In *Cleburne*, such homes could still locate in the zone with a special use permit. *Id.* at 436 n.3. Here, Appellants are afforded *no* such opportunity as the Long Branch Ordinance makes no provision for churches. In *Cleburne*, the mentally handicapped were at least given an opportunity to hear and publicly rebut the community's objections and possible prejudices. Here, Appellants are denied such an opportunity by the complete facial prohibition of churches from the C-1 District.

**II. SINCE PLAINTIFFS SHOULD SUCCEED ON THEIR FACIAL CHALLENGE TO LONG BRANCH’S ORDINANCE, THE DISTRICT COURT ERRED IN DENYING A PRELIMINARY INJUNCTION.**

Where a district court has denied a motion for a preliminary injunction, we may order the injunction to issue if the four factors required to grant a preliminary injunction are apparent on the record before us.” *Tenaflly*, 309 F.3d at 178 (internal citations and quotations omitted). Here, the lower court’s sole basis for denying the Appellants a preliminary injunction was its holding that “Plaintiffs do not demonstrate a likelihood of success on the merits.” Pl. SJM Op. at 32; Apx. 36. For all of the reasons discussed above, this Court should hold that Appellants have established “a reasonable probability,” *Tenaflly*, 309 F.3d at 178, of prevailing on their claims under the First and Fourteenth Amendment and RLUIPA that the City’s zoning ordinance is facially unlawful.

The remaining three factors for injunctive relief—the balance of hardships, the public interest, and irreparable injury—also favor a preliminary injunction. With respect to the balance of hardships, a preliminary injunction would not harm the City more than denying relief would harm the plaintiffs. The City would suffer no cognizable harm by denying it the ability to enforce an illegal Ordinance. Moreover, where the City already allows numerous assembly uses in the C-1 zone, there is no “serious injury,” *Tenaflly*, 309 F.3d at 178, to its interests in allowing assembly for religious purposes also. On the other hand, without an injunction, the

Mission’s constitutional rights to free exercise of religion, free speech, and equal protection “will be impaired.” *Id.* In such cases, “the balance easily tips in the plaintiffs’ favor.” *Id.*

Likewise, the public interest is always promoted by enjoining unconstitutional laws. In addition, because the City cannot show that there are any “societal benefits justifying a burden on religious freedom, the public interest clearly favors the protection of constitutional rights.” *Id.* (internal citations and quotations omitted).

Finally, there is no question that the Mission has suffered greatly, and continues to suffer, from Long Branch’s Ordinance.

Tragically, instead of rebuilding my congregation, I am frequently forced to turn away people ‘in need’ because we do not yet have use. It grieves me that I had to tell about 45 people this past Thanksgiving that I could not feed them. . . .

Supplemental Declaration of Rev. Kevin Brown ¶¶ 4-12 (Mar. 25, 2002); Apx. 333-336. “Limitations on the free exercise of religion inflict irreparable injury.” *Tenafly*, 309 F.3d at 178. *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”). Because the City’s facially unconstitutional ordinance has deprived the Appellants of their rights to free exercise of religion and other constitutional rights, the irreparable injury requirement is established.

## CONCLUSION

For the foregoing reasons, the lower court's decision denying Plaintiffs-Appellants' motion for preliminary injunction should be reversed.

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**CERTIFICATE OF BAR MEMBERSHIP**

I, Roman P. Storzer, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit on June 7<sup>th</sup>, 2002, and I am a member of good standing of the Court.

Date:

\_\_\_\_\_  
ROMAN P. STORZER

**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of Microsoft Word word-processing program, this brief contains 13,913 words and therefore is in compliance with the type-volume limitations set forth in Rule 32(a)(7)(B).

Date:

\_\_\_\_\_  
ROMAN P. STORZER

**CERTIFICATE OF SERVICE**

I, ROMAN P. STORZER, attorney for Plaintiffs-Appellants, hereby certify that I am duly authorized to make this certification - that on the 10th day of September, 2003, I did cause two (2) true and correct copies of Brief of Plaintiffs-Appellants and one (1) copy of the Appendix to be delivered by Federal Express to the following:

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